No. SC86281

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

ANTOINE L. BULLOCK,

Appellant.

Appeal from the Circuit Court of Franklin County, Missouri
20th Judicial Circuit, Division 1
Honorable Gael D. Wood, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for possession of a controlled substance with intent to deliver, § 195.211, RSMo 2000, obtained in the Circuit Court of Franklin County, and for which appellant was sentenced to five years in the custody of the Department of Corrections. This appeal was originally decided by the Missouri Court of Appeals, Eastern District, who then transferred the case to this Court following its opinion. Therefore, jurisdiction lies in this Court. Article V, § 10, Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Appellant, Antoine L. Bullock, was charged by information with possession of more than five grams of marijuana with intent to distribute (L.F. 25). Following a waiver of jury trial, a bench trial was held on March 6, 2003, in the Circuit Court of Franklin County, the Honorable Gael D. Wood presiding (L.F. 4, 45).

The sufficiency of the evidence is at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: Around noon on June 20, 2001, Corporal Gary Swartz of the Missouri State Highway Patrol was traveling east on Interstate 44 in Franklin County, Missouri, when he saw a white Nissan Maxima following within a car length of a tractor trailer (Tr. 8-10). The Maxima then changed lanes to pass the truck, and then pulled back into the right lane, leaving only a car length between the car and truck (Tr. 10). Because the Maxima followed too closely and cut in on the truck, Swartz activated his lights and pulled the car over near the 254-mile marker near Gray Summit (Tr. 10).

Swartz exited his car and approached the Maxima on the passenger side, where appellant was sitting (Tr. 10-12). Swartz asked the driver, Trenton Bryant, for his driver's license, and Bryant gave him an Ohio identification card (Tr. 11). Swartz told Bryant why he had stopped the car, then asked Bryant to exit the Maxima and come back to the patrol car (Tr. 12).

In the patrol car, Bryant was very nervous (Tr. 12, 14). Bryant told Swartz that he had flown down to Phoenix, Arizona on Saturday, June 16 to "get his life in order," later finding that he did not have enough money to fly back to his home in Cincinnati, Ohio (Tr. 12). He said that appellant was a friend who had come from Cincinnati to drive him home (Tr. 12). Bryant

volunteered a lot more information than Swartz asked for and insisted that Swartz contact his sister and a nephew in Phoenix to verify his story (Tr. 14).

After speaking with Bryant, Swartz went to the car to speak with appellant (Tr. 13). Appellant gave Swartz his Ohio driver's license and told Swartz that Bryant's mother had rented the car to go down to Arizona to pick Bryant up (Tr. 13). He said that he had left Cincinnati on June 16, the same day Bryant claimed he flew to Phoenix, and claimed that the only place they had been in Arizona was Flagstaff (Tr. 13). While speaking with Swartz, appellant was very evasive, failed to make eye contact with Swartz, and appeared nervous (Tr. 14). When Swartz asked appellant for the car's rental agreement, appellant reached into the glove box to get the rental agreement for the car, but instead gave Swartz an insurance card/accident report form (Tr. 14, 34). While Swartz was speaking with appellant, Bryant got out of the patrol car and approached Swartz, asking if there was a problem (Tr. 14). At this point, Bryant was very excitable and very nervous (Tr. 14). Bryant reached into the Maxima and tried to find the rental agreement himself (Tr. 14).

Eventually, Swartz and Bryant returned to the patrol car, where Swartz ran criminal histories and license checks on Bryant and appellant (Tr. 15, 41). Because Bryant's Ohio driver's license was suspended, Swartz issued Bryant a summons for driving without a valid operator's license (Tr. 15). Swartz gave Bryant a warning for the moving violations and told him he was free to leave (Tr. 15). Bryant shook Swartz's hand and thanked him, got out of the patrol car, and started towards his vehicle (Tr. 16, 42). When Bryant got to the rear of the Maxima, Swartz got out of the patrol car and asked Bryant if he would mind answering a few

more questions (Tr. 16, 42). Bryant said, "Sure," and walked over to Swartz (Tr. 17). Swartz told Bryant that he was concerned because Bryant and appellant had told differing stories and was concerned the two might be involved in illegal activity, which Bryant denied (Tr. 17). Swartz asked if there was any marijuana in the car, and Bryant said no, that he did not use marijuana (Tr. 17-18). Swartz asked about other drugs, and Bryant again said there was none in the car (Tr. 18). Swartz then asked for consent to search, and Bryant told him to go ahead and search (Tr. 18).

Prior to searching, Swartz also asked appellant if there was anything illegal in the car, and appellant said there was nothing that he was aware of (Tr. 18). Appellant also gave permission to search the car and its contents (Tr. 18).

Swartz first searched the passenger compartment of the car and found nothing illegal (Tr. 19). Swartz then opened the trunk, finding several duffel bags and items of loose clothing, much of which appeared brand new (Tr. 19, 26). He also smelled a strong odor of marijuana (Tr. 19). Swartz found one black duffel bag in the front of the trunk, which, in his experience, felt like hard bricks of compressed marijuana (Tr. 19). Swartz then turned and placed the two men under arrest, putting Bryant in his car and appellant in the car of another trooper who had arrived to assist (Tr. 19-20, 42). Swartz then returned to the trunk of the Maxima and opened the black duffel bag, finding several bundles containing processed marijuana (Tr. 20-21).

The car was later taken to the Troop C Highway Patrol Garage, where an inventory search was conducted (Tr. 23, 45). Appellant was present during the inventory search, and admitted that two other duffel bags in the trunk belonged to him (Tr. 23-25). Those bags had

been right next to the bag containing the marijuana (Tr. 29). One of those duffel bags had appellant's name on an airline luggage tag for a flight from Phoenix to Dallas/Ft. Worth from that past April (Tr. 25). Inside the pocket of a pair of shorts in the labeled duffel bag was a plastic bag containing a sock, inside of which was $3000 in cash (Tr. 26-27, 45). A total of $6000 was found in the bags in the trunk (Tr. 32).

The parties stipulated to the lab report of tests conducted on the substance in the bundles, which stated that the bundles contained over 25 pounds of marijuana (Tr. 22; L.F. 46).

Appellant presented no evidence in his defense (Tr. 50).

At the close of the evidence and arguments of counsel, the court took the case under advisement until March 25, 2003, at which time appellant was found guilty as charged (L.F. 4). The court sentenced appellant to five years in the custody of the Department of Corrections (L.F. 51; Tr. 58). This appeal follows.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS AND IN ADMITTING EVIDENCE FOUND DURING THE SEARCH OF THE VEHICLE IN WHICH APPELLANT WAS A PASSENGER BECAUSE THE EVIDENCE WAS ADMISSIBLE IN THAT APPELLANT HAD NO STANDING TO CHALLENGE THE LEGITIMACY OF THE SEARCH, THE SEARCH WAS BASED ON CONSENT GIVEN DURING A VOLUNTARY ENCOUNTER, AND, TO ANY EXTENT IT WAS REQUIRED, THERE WAS REASONABLE SUSPICION TO JUSTIFY AN EXTENDED DETENTION TO INVESTIGATE CRIMINAL ACTIVITY.

Appellant contends that the trial court erred in denying his "motion for judgment of acquittal" because the search of the car in which he was a passenger was improper (App.Br. 9). Appellant argues that, in the time between the conclusion of the traffic investigation and the request for consent, there were no "new facts or circumstances" to justify Corporal Gary Swartz's request for consent to search (App.Br. 10). Appellant further argues that the nervousness of himself and the driver did not justify the search (App.Br. 10).

A. Facts

Prior to trial, appellant filed a motion to suppress evidence, claiming in one brief paragraph that the evidence found in the car "was seized after a search without probable cause and without a search warrant in violation of defendant's rights" under the federal and state constitutions (L.F. 41).

At a hearing on the motion to suppress,[1] Corporal Swartz testified that he pulled over a vehicle, driven by Trenton Bryant and in which appellant was a passenger, for following too closely and cutting in (Mot.Tr. 5).[2] As he approached the vehicle, he noticed that there was what appeared to be a Bible (and actually turned out to be a Koran) in the back window deck of the car (Tr. 6). This did not mean much to him until he realized that the car was a rental car and that the Koran was not accessible to either of the car occupants, which made him suspicious because, in his prior experience with other drug cases, people transporting drugs would place Bibles in plain view of officers so that officers would believe the occupants of the car to be religious and law-abiding (Mot.Tr. 7).

After asking Bryant to come back to the patrol car, which Bryant did, Swartz told Bryant why he pulled Bryant over (Mot.Tr. 7-8). Bryant told Swartz that he knew he should not be driving because he knew he did not have a licence, but that he was just helping his friend drive

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[1]The motion hearing was a joint hearing on suppression motions filed individually by appellant and driver Trenton Bryant in each of their respective cases (Mot.Tr. 3).

[2]The Eastern District noted in its memorandum opinion that the transcript of the motion to suppress hearing was not made part of the record on appeal. State v. Bullock, ED83275, memo op. at 6 (Mo.App., E.D. June 1, 2004). Respondent was served a copy of the motion to suppress transcript by appellant, so does not know if this finding was made in error. However, if the transcript is not in the record before this Court, that omission must be held against appellant, as he had the obligation to provide the record to this Court. Supreme Court Rule 30.04(c).

(Mot.Tr. 8). When asked, Bryant told Swartz that he and appellant were driving from Phoenix, Arizona, where he had been staying with his nephew, and that the car had been rented by his sister (Mot.Tr. 8). Bryant said the rental papers were in the glove box of the car, so Swartz got out of the patrol car to get the papers from appellant (Mot.Tr. 8).

At the car, Swartz asked appellant for identification and the rental agreement, and appellant gave him an Ohio driver's license (Mot.Tr. 9). As appellant looked in the glove compartment for the rental agreement, Swartz asked appellant where they were coming from, and he said they had been in Flagstaff, Arizona (Mot.Tr. 9). Swartz asked if they had been anywhere else in Arizona, and appellant said, "No, just Flagstaff" (Mot.Tr. 9). Appellant then pulled out a sheet that he believed was the rental agreement, but it was an insurance and accident report form (Mot.Tr. 9). Swartz asked who had rented the vehicle, and appellant said that Bryant's mother had rented it (Mot.Tr. 9). During this conversation, appellant was nervous and evasive, and he refused to make eye contact with Swartz (Tr. 13-14).

At that point, Bryant got out of the patrol car and walked up to the vehicle, asking if there was a problem (Mot.Tr. 9-10; Tr. 14). Swartz told appellant to remain in the patrol car, but Bryant refused to go back, saying he needed his medication, which Swartz retrieved (Mot.Tr. 10). When told they were having trouble finding the rental agreement, Bryant reached into the car and started digging through the glove compartment, finding the same form that appellant had already tried to give Swartz (Mot.Tr. 10). During this, Bryant was very excitable and very nervous (Tr. 14). Swartz eventually succeeded in getting Bryant to return to the patrol car (Mot.Tr. 10). Swartz found out from appellant that he had left Ohio on Saturday, June 16,

and then he took appellant's license and returned to the patrol car, where he ran computer checks on the two (Mot.Tr. 11).

When he got to the car, Bryant asked Swartz if he had the medication Bryant needed, and Swartz reminded him that he already gave it to him (Mot.Tr. 11). Bryant checked his pockets and could not find it, so Swartz returned to the car, finding the Tylenol back in the glove compartment where he had first found it (Mot.Tr. 11). When he came back and gave the bottle to Bryant, Bryant did not take any of the pills, but instead nervously twirled the bottle in his hands (Mot.Tr. 11).

Swartz completed the computer checks, confirming that Bryant's license was suspended (Mot.Tr. 11-12). After Bryant again told his story about the trip, confirming that his sister, not his mother, had rented the car, Swartz wrote Bryant a ticket for driving without a valid license, and gave him a warning for the moving violations (Mot.Tr. 12-13). Swartz then told Bryant he was free to go (Mot.Tr. 13). Bryant thanked Swartz, shook his hand, got out of the car, and started walking back to his vehicle (Mot.Tr. 13).

At that point, because Swartz was concerned about the inconsistencies in the versions of events given by appellant and Bryant, he got back out of the patrol car and asked Bryant if he would mind if Swartz asked few more questions (Mot.Tr. 14). Bryant said, "Sure," and walked back over to Swartz (Mot.Tr. 14). Swartz told Bryant that he was concerned because of the different stories, then asked if appellant had marijuana or other drugs in the car, which Bryant denied (Mot.Tr. 14). Swartz then asked if he could search the vehicle for anything illegal, and Bryant said, "Sure, go ahead" (Mot.Tr. 14).

Because he never found the rental papers to confirm who had control of the vehicle, Swartz also wanted to ask appellant for consent to search (Mot.Tr. 14). He first asked appellant if there was anything illegal in the car, and appellant said, "Not that I'm aware of" (Mot.Tr. 14). Swartz then asked appellant if he could search the car and contents for anything illegal, and appellant said, "Yes" (Mot.Tr. 14-15).

Swartz had appellant get out of the car, and then he searched the driver's compartment, finding nothing (Mot.Tr. 15). He then searched the trunk, which smelled strongly of marijuana, where he found a black duffel bag which felt like it contained compressed bricks of marijuana (Mot.Tr. 15). He then arrested appellant and Bryant (Mot.Tr. 15).

Bryant testified at the hearing, claiming that he only granted consent because Swartz said he would have the other trooper detain them while he went to get a warrant if he did not consent (Mot.Tr. 53-54). He also believed that he was pulled over and the car subsequently searched because of racial profiling (Mot.Tr. 54-55).

At the conclusion of the hearing, the prosecutor argued that appellant, as a passenger in the vehicle, had no standing to challenge the search of the vehicle (Tr. 71). The court overruled the motion to suppress (L.F. 3). The evidence found during the search was admitted at trial over objection (Tr. 18-19, 21-22, 24).

B. Preservation

Appellant's claim on appeal is that the search of the car in which appellant was a passenger was improper because there was no reasonable suspicion to justify the continued detention of the car after the conclusion of the traffic stop (App.Br. 9-10). In order to

preserve for appellate review a claim regarding the admissibility of questioned evidence, a timely specific motion to suppress must be filed and, if such motion is denied, the issue must be kept alive by a timely specific objection at trial. State v. King, 873 S.W.2d 905, 908 (Mo.App., S.D. 1994). Here, appellant filed a motion to suppress, but that motion was simply boilerplate, claiming only that the search was without probable cause or a search warrant—it never mentioned the specific grounds on which appellant's claim is now based (L.F. 41). Further, appellant's objection at trial to evidence of the search did not specify the reason the search was invalid, as he stated, "There was no basis for the officer whatsoever in executing this search. It's in violation of both the United States Constitution and the State Constitution dealing with the right of search of seizure" (Tr. 18-19). Finally, appellant's point relied on is unclear as to the court action appellant is challenging, as he alleges error in denying appellant's motion for judgment of acquittal, not the erroneous admission of evidence, even though the point and argument address the propriety of the search (App.Br. 9-10). Because appellant's motion to suppress and trial objections failed to include the claim he now raises on appeal, and because his point relied on fails to clearly identify the ruling challenged, appellant's claim is unpreserved. Id.

C. Standard of Review

Because appellant's claim on appeal is not preserved, it is reviewable, if at all, only for plain error. Supreme Court Rule 30.20. Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice would occur if the error was left uncorrected. State v. Williams, 97

S.W.3d 462, 470 (Mo. banc), cert. denied 123 S.Ct. 2607 (2003). Plain error does not embrace all trial error, and this Court's discretion to reverse a conviction based on plain error should be utilized sparingly. State v. Williams, 46 S.W.3d 35, 40 (Mo. App., E.D. 2001). Appellant bears the heavy burden of demonstrating manifest injustice or a miscarriage of justice. State v. Haughton, 97 S.W.3d 533, 534 (Mo. App., E.D. 2003). An assertion of plain error places a much greater burden on a defendant than an assertion of prejudicial error. State v. Reed, 21 S.W.3d 44, 47 (Mo.App., S.D. 2000).

Further, in reviewing a trial court's ruling on a motion to suppress, this Court reviews the evidence in the light most favorable to the trial court's ruling, and considers evidence from the suppression hearing and any additional evidence presented at trial. State v. Edwards, 116 S.W.3d 511, 530 (Mo. banc 2003), cert. denied 124 S.Ct. 1417 (2004).

D. Appellant Had No "Standing" to Challenge the Search

Appellant does not have "standing" to contest the search of the car in this case because he was only a passenger in the car at the time of the stop. The United States Supreme Court has made clear that, to avail himself of the Fourth Amendment protection, a person must have a legitimate and reasonable expectation of privacy in the premises or property searched. Rakas v. Illinois, 439 U.S. 128, 134-40, 99 S.Ct. 421, 58 L.Ed.2d 387 (1979); United States v. Salvucci, 448 U.S. 83, 91-92, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); Minnesota v. Carter, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998). While this right to avail oneself of Fourth Amendment protection is commonly referred to as having "standing" to challenge the legality of the search, the Court stated that the definition of that right is not subject to

"traditional standing inquiries," but is "within the purview of substantive Fourth Amendment law[.]" Rakas, 439 U.S. at 140; see also Carter, 525 U.S. at 87-88. The Court held that the passengers in the motor vehicle in Rakas failed to show that they had a legitimate expectation of privacy in either the glove compartment or the area under the seat, stating, "Like the ***trunk of an automobile***, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy." Rakas, 439 U.S. at 148-49 (emphasis added).

This Court has applied the same standard as that in Rakas in evaluating the right to challenge the legality of a search or seizure for alleged violations of both the federal and state constitutions, holding that Missouri's "reasonable expectation" of freedom "from governmental intrusion" standard is "identical to the 'legitimate expectation of privacy' test adopted in Rakas . . . ." State v. Lingar, 726 S.W.2d 728, 735-36 (Mo. banc), cert. denied 484 U.S. 872 (1987); see also State v. McCrary, 621 S.W.2d 266, 273 (Mo. banc 1981). Missouri courts have also adopted Rakas's reasoning as to "standing" and the passenger of a motor vehicle. "'The mere status of being a passenger in a vehicle does not accord the passenger a legitimate expectation of privacy in the vehicle entitling him to assert a Fourth Amendment challenge to the search of the vehicle.'" State v. Sullivan, 935 S.W.2d 747, 755 (Mo.App. S.D. 1996), quoting State v. Martin, 892 S.W.2d 348, 352 (Mo. App., W.D. 1995). Here, appellant was merely a passenger in the rental car driven by Bryant, and therefore, as a passenger, had no reasonable expectation of privacy in the contents of the car. Further, even though the renter of a car is not the car's owner, the renter or other authorized driver may

obtain a reasonable expectation of privacy in the car. See State v. Toolen, 945 S.W.2d 629, 632 (Mo. App., E.D. 1997). However, appellant, as he admitted to Swartz, did not rent the car (Mot.Tr. 9, 17). Therefore, appellant did not acquire a reasonable expectation of privacy in the car. It was appellant's burden to establish that he had a reasonable expectation of privacy in the vehicle. Rakas, 437 U.S. at 131 n. 1; Rawlings v. Kentucky, 448 U.S. 98, 104, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); State v. Sweet, 796 S.W.2d 607, 611 (Mo. banc 1990), cert. denied 499 U.S. 932 (1991); State v. Mosby, 94 S.W.3d 410, 416 (Mo. App., W.D. 2003). Because appellant was merely a passenger in the car and did not rent it or presented no evidence that he was authorized by the rental company to drive the car, appellant failed to establish that he had standing to challenge the search. Therefore, appellant failed to establish that the trial court plainly erred in admitting the evidence found during the search.

E. The Search was a Valid Consensual Search

Appellant does not contend that the initial stop of the car was not valid, but that, once the investigation of the traffic offense was completed, Trooper Swartz did not have reasonable suspicion to further detain Bryant and him (App.Br. 10). However, Swartz did not need reasonable suspicion, as the conversation following the investigation of the traffic offense and the subsequent search was consensual. A consensual search conducted without a search warrant does not violate the Fourth Amendment, even if the search is not otherwise supported by probable cause or reasonable suspicion. State v. Hyland, 840 S.W.2d 219, 221 (Mo. banc 1992); State v. Haldiman, 106 S.W.3d 529, 535 (Mo.App., W.D. 2003); State v. Middleton, 43 S.W.3d 881, 885 (Mo.App., S.D. 2001). An officer may ask a citizen if he has contraband in

his car or for permission to search a car at any time; if consent is given without coercion, the subsequent search is not prohibited. Middleton, 43 S.W.3d at 885; State v. Woolfolk, 3 S.W.3d 823, 830 (Mo.App., W.D. 1999). For consent to be valid, it must be freely and voluntarily given, meaning that, under the totality of the circumstances, the objective observer would find that the person giving consent made a free and unconstrained choice to do so, and was not merely a submission to a show of authority amounting to duress, coercion, or fraud. Hyland, 840 S.W.2d at 221; State v. Harp, 101 S.W.3d 367, 373 (Mo.App., S.D. 2003). An encounter following a traffic stop becomes consensual when a reasonable person in the suspect's position would feel free to leave. State v. Weddle, 18 S.W.3d 389, 395 (Mo.App., E.D. 2000); State v. Scott, 926 S.W.2d 864, 869 (Mo.App., S.D. 1996). Among the circumstances this Court will consider are: (1) the number of officers present; (2) the degree to which the officers emphasized their authority, including the language or tone of voice used; (3) whether weapons were displayed; (4) whether the individual was already in custody; (5) whether there was any fraud on the part of the officers; and (6) evidence of what the individual consenting did and said. Harp, 101 S.W.3d at 373; Scott, 926 S.W.2d at 869.

Here, the totality of circumstances shows that Bryant freely and voluntarily consented to the search of the car. At the time Swartz asked Bryant for consent, there were only two troopers at the scene, and one had remained in his car until after the consent was given (Mot.Tr. 13; Tr. 41-42). The trooper did not use language emphasizing his authority, but was very deferential, first asking Bryant if "he would mind if I asked him a few more questions" (Tr. 16; Mot.Tr. 15). Then, after Swartz asked if there were any illegal drugs in the car, he asked, "Can

I search your vehicle for anything illegal?" (Mot.Tr. 14). Bryant's actions also show that the consent was voluntary, as, when he was first asked if he would mind answering more questions, Bryant said, "Sure," turned around, and walked back to meet the officer (Mot.Tr. 14; Tr. 17). When asked for permission to search the car, Bryant said, "Sure. Go ahead" (Mot.Tr. 14). It was clear that Bryant was not in custody or being detained at this time and that he was free to go, as Swartz told him that he was free to go, he thanked Swartz and shook his hand, and he got out of the patrol car and started walking back to his vehicle (Mot.Tr. 13; Tr. 16). Clearly, the consent to search given by Bryant was free and voluntary. Further, even though he did not have to, Swartz then asked appellant if he would consent to the search of the car and contents, including his own, asking, "Can I search your vehicle ***and contents*** for anything illegal?", and appellant said, "Yes" (Mot.Tr. 14-15; Tr. 18)(emphasis added). Under the totality of the circumstances, the search of the car and of the duffel bag in this case was based on voluntary consent, and was therefore valid. Therefore, appellant has failed to meet his burden of establishing plain error in the admission of the marijuana.

Appellant maintains that this Court's holding in State v. Barks, 128 S.W.3d 513 (Mo. banc 2004), and the Western District's holdings in State v. Hoyt, 75 S.W.3d 879 (Mo.App., W.D. 2002), and State v. Woolfolk compel reversal because those cases found that the law enforcement officer did not have reasonable suspicion to further detain the suspects (App.Br. 9-10). However, appellant is incorrect for two reasons. First, as stated above, the search was based on consent, and therefore reasonable suspicion was not required. As Barks and Hoyt dealt with reasonable suspicion to extend a stop and then conduct a search, and not with

consent to search given during a voluntary encounter, they are inapplicable. Barks, 128 S.W.3d at 517; Hoyt, 75 S.W.3d at 883.

Second, Barks and Woolfolk actually support the trial court's ruling in this case. Barks, quoting Woolfolk, acknowledged that, so long as a person is free to leave after a traffic stop, "'the officer can talk to him and is free to ask whether contraband is on his person, or in his car, or in his residence.'" Barks, 128 S.W.3d at 517, quoting Woolfolk, 3 S.W.3d at 830. A review of the facts in Barks support the conclusion that, unlike Barks, the consent in this case was voluntary. In Barks, the defendant was not free to leave under the circumstances, as the patrolman had positioned himself at the driver's side window, the lights on the patrol car remained activated, Barks was not told he was free to go, and the conversation was constant. Barks, 128 S.W.3d at 517. However, in this case, the trooper told Bryant (the driver) that he was free to leave prior to the voluntary conversation, and Bryant started to walk back to his car (Tr. 15). The trooper was not at the window of Bryant's car, but was at his patrol car when he asked Bryant if he "would mind if I asked him a few more questions" (Tr. 16). Bryant said, "Sure," and returned to the trooper (Tr. 17). The trooper asked only three questions before asking to search the car, and when he asked, was told that he "could go ahead and search the car" (Tr. 17-18). Clearly, under even Barks, the search here was a valid consent search. As the totality of the circumstances show that the consent was voluntarily given in this case, thus rendering the search a valid consensual search, Barks, Hoyt, and Woolfolk provide appellant no relief.

F. There Was Reasonable Suspicion to Support Further Investigation

Finally, even if reasonable suspicion was required for Swartz to conduct further investigation, it was present here. When a traffic stop is made for the violation of a traffic offense, the period of detention may be extended beyond that reasonably necessary to investigate the offense if facts arise ***during the traffic stop*** creating an objectively reasonable suspicion of criminal activity. Barks, 128 S.W.3d at 517 (Mo. banc 2004); State v. Watkins, 73 S.W.3d 881, 883 (Mo. App., E.D. 2002); Woolfolk, 3 S.W.3d at 829 (Mo. App., W.D. 1999). Here, sufficient facts arose creating an objectively reasonable suspicion. First, both appellant and Bryant were very nervous (Mot.Tr. 9-12; Tr. 14). While nervousness alone will not support reasonable suspicion, it will when coupled with other factors. State v. Day, 87 S.W.3d 51, 55 (Mo.App., S.D. 2002); State v. Bunts, 867 S.W.2d 277, 280 (Mo.App., S.D. 1993). Here there was another factor—Bryant and appellant made inconsistent statements about their trip, therefore giving rise to reasonable suspicion (Mot.Tr 8-9; Tr. 12-13). State v. Logan, 914 S.W.2d 806, 809 (Mo. App., W.D. 1995); United States v. Pulliam, 265 F.3d 736, 740 (8th Cir. 2001)("Contradictory statements establish the reasonable suspicion necessary to detain a motorist further[.]"); see United States v. Sowers, 136 F.3d 24, 27 (1st Cir 1998)(nervousness and contradictory statements by driver and passenger justified extended detention).

Finally, the religious text found in the back window of the rental car where it was not accessible to anybody in the car gave rise to a suspicion, based on the officer's experience, that the text had been placed there to make officers believe the occupants of the car were religious and law-abiding (Mot.Tr. 6-7; Tr. 7). Admittedly, carrying a religious book in a car, standing

alone, is consistent with innocent conduct. However, factors consistent with innocent conduct when standing alone may amount to reasonable suspicion when taken together. United States v. Sokolow, 490 U.S. 1, 9-10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); State v. Bizovi, 129 S.W.3d 429, 432 (Mo.App., E.D. 2004); Day, 87 S.W.3d at 55. Therefore, appellant's and Bryant's profound nervousness, their inconsistent statements, and the placement of the Koran in the back windshield for the only apparent purpose of being seen by one approaching the car from behind (i.e. a police officer) gave rise to reasonable suspicion justifying an extended period of detention for further investigation.

Because appellant did not have a reasonable expectation of privacy in the contents of Bryant's vehicle, and thus had no "standing" to challenge the search of the car, because the search was based on Bryant's free and voluntary consent, and because, to any extent reasonable suspicion was required, there was reasonable suspicion to justify an extended period of detention, the trial court did not plainly err in refusing to suppress the evidence found during the search of the car. Therefore, appellant's first point on appeal must fail.

II.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT APPELLANT WAS IN JOINT CONSTRUCTIVE POSSESSION OF THE MARIJUANA IN THAT THE TOTALITY OF THE CIRCUMSTANCES, NAMELY APPELLANT'S NERVOUSNESS, HIS FALSE INCONSISTENT STATEMENTS TO TROOPER SWARTZ, THE COMMINGLING OF HIS PERSONAL BELONGINGS WITH THE MARIJUANA, THE PRESENCE OF A LARGE QUANTITY OF MARIJUANA AND STRONG DISTINCTIVE ODOR, AND THE PRESENCE OF $3000 CASH AMONG APPELLANT'S BELONGINGS FOUND NEXT TO THE DRUGS, SHOWS THAT APPELLANT KNOWINGLY AND INTENTIONALLY POSSESSED THE MARIJUANA.

Appellant claims that the trial court erred in overruling his motion for judgment of acquittal because the evidence was insufficient to convict him of possession of the marijuana found in the trunk of the car (App.Br. 10-11). Appellant claims that the State failed to prove possession because appellant was the passenger, there was nothing illegal and no odor of marijuana in the passenger compartment of the car, his nervousness could not be the basis of the subsequent search, and appellant never admitted to knowing of or possessing the marijuana (App.Br. 10-11).

In examining the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable trier of fact

might have found a defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc), cert. denied 525 U.S. 1021 (1998). The appellate court does not act as a "super juror" with veto powers, but gives great deference to the trier of fact. Id. In applying the standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. Id.

To sustain a conviction for possession of a controlled substance, the State must prove (1) conscious and intentional possession of the substance, either actual or constructive, and (2) awareness of the presence and nature of the substance. State v. Purlee, 893 S.W.2d 584, 587 (Mo. banc 1992); State v. White, 28 S.W.3d 391, 398 (Mo.App., W.D. 2000). Both possession and knowledge may be proved by circumstantial evidence. Id. A person has actual possession of controlled substance if it is either on his person or within his easy reach and convenient control. State v. Metz, 43 S.W.3d 374, 379 (Mo.App., W.D. 2001); § 195.010(32), RSMo 2000. A person has constructive possession if he has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons. State v. Kerns, 85 S.W.3d 73, 76 (Mo.App., S.D. 2002); § 195.010(32), RSMo 2000. Constructive possession may be shown when other facts bolster the inference that the defendant had knowledge of the presence and nature of the substance. Id. at 78; State v. Gonzalez, 108 S.W.3d 209, 211 (Mo.App., S.D. 2003). At a minimum, there must be evidence that appellant had access to and control of the area where the materials were found. State v. Charlton, 114 S.W.3d 378, 385 (Mo.App., S.D. 2003). Further, possession may be

sole or joint, and joint possession is found when two or more persons share possession of a substance. § 195.010(32), RSMo 2000. Where more than one person is present in a vehicle containing a controlled substance, a defendant is still deemed to have possession and control where there is additional evidence connecting him with the controlled substance. State v. Johnson, 81 S.W.3d 212, 216 (Mo.App., S.D. 2002).

Here, there was sufficient evidence of "additional circumstances" proving that appellant was, at the very least, in joint constructive possession of the marijuana found in the trunk. First, appellant admitted to owning two duffel bags found in the trunk right next to the duffel bag containing the marijuana, and one of those had an airline tag showing that it belonged to appellant (Tr. 23-25). Commingling of the defendant's personal belongings with the controlled substance supports a finding of possession. Johnson, 81 S.W.3d at 215; State v. Morris, 41 S.W.3d 494, 497 (Mo. App., E.D. 2000).

Second, contemporaneous possession of large quantities of money along with the controlled substance supports an inference of knowing and intentional possession. Charlton, 114 S.W.3d at 384. Here, appellant had $3000 in the pocket of a pair of shorts inside the duffel bag he admitted owning, and which was found right next the bag containing the marijuana (Tr. 23-28, 45). This also supports a finding that appellant knowingly possessed the marijuana.

Third, there was more than 25 pounds of marijuana in the trunk of the car which emitted a very strong odor of marijuana (Tr. 19; L.F. 46). As appellant's belongings, including $3000 in cash, were in the trunk of the car and, according to the statement to Swartz, he had been using the car since for at least four days, the reasonable inference is that appellant had opened the

trunk to access his belongings would have smelled the marijuana (Tr. 13,) The presence of a large quantity of a controlled substance which produces a discernable odor supports a finding of possession, even if there is no direct evidence of the defendant's knowledge of the odor of marijuana. Johnson, 81 S.W.3d at 216; Morris, 41 S.W.3d at 497; see Purlee, 839 S.W.2d at 588. of direct evidence of the defendant's knowledge of the odor of marijuana.

Fourth, appellant's statements to Swartz about the trip were inconsistent with Bryant's statements. Bryant stated that they were traveling from Phoenix, Arizona, while appellant said that the only place they had been in Arizona was Flagstaff (Tr. 12-13). Bryant said he had flown down to Arizona on June 16th to "get his life in order," then later realized that he did not have the money to get back to Cincinnati, so appellant came to get him (Tr. 12). However, appellant said Bryant's mother rented the car and he left Cincinnati on the June 16th to go pick up Bryant—the exact same date as Bryant allegedly flew to Phoenix (Tr. 13). The reasonable inference from this testimony is that both appellant's and Bryant's statements were false. Making false statements to law enforcement officers demonstrates a consciousness of guilt and an intent to commit a criminal act. See State v. Calicotte, 78 S.W.3d 790, 794 (Mo.App., S.D. 2002)(defendant's false statements sufficient to establish intent to steal).

Finally, when appellant was speaking to Swartz, he was nervous and evasive, and failed to make eye contact with the trooper (Tr. 14). He was so nervous that he gave the trooper the wrong form when asked for the rental agreement (Tr. 14). While nervousness ***alone*** is not sufficient evidence to support a conviction for possession, it is probative of appellant's awareness of the presence of the marijuana and does constitute an incriminating fact that will

support conviction. Johnson, 81 S.W.3d at 216; State v. Shinn, 921 S.W.2d 70, 73 (Mo. App., E.D. 1996).

Appellant's contention that this case is factually the same as Johnson, and therefore Johnson is dispositive, is meritless (App.Br. 11). In Johnson, the only facts supporting the conviction were that the defendant was nervous (which will not alone support conviction), that the car was rented by the defendant, and that a large quantity of drugs was hidden in the "factory voids" of the rental car. Johnson, 81 S.W.3d at 217. The Southern District found that "this alone" failed to show knowledge and control. Id. However, in Johnson, the occupants in the car gave the same story about their trip, and there was no evidence that the hidden drugs produced any discernable odor. Id. at 214, 216.

In this case, as shown above, there were far more additional facts showing knowledge and control. In addition to nervousness and a large quantity, there were the inconsistent false statements about the trip, the discernable odor of marijuana in the trunk, the presence of appellant's personal belongings right next to the bag containing the marijuana, and appellant's admitted possession of the bag containing a large amount of cash found next to the marijuana. Because the totality of the circumstances showed that appellant was in constructive possession of the marijuana found in the trunk of the car, there was sufficient evidence to support appellant's conviction, and his second point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains 7364 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 4th day of October, 2004, to:

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APPENDIX